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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1927.

NO. ~~768~~ 68

FOSTER FOUNTAIN PACKING COMPANY, Inc.,
and SEA FOOD COMPANY,
Appellants

Vs.

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC, ET AL.
Appeal From the District Court of the United States for the
Eastern District of Louisiana.

NO. ~~769~~ 69

L. O. JOHNSON, JR., and SEA FOOD COMPANY,
TANAS HEBERT, ET AL.
Appellants

Vs.

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC, ET AL.
Appeal From the District Court of the United States for the
Eastern District of Louisiana.

REPLY BRIEF FOR APPELLANTS

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In The

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OCTOBER TERM, 1927.

NO. 768

FOSTER FOUNTAIN PACKING COMPANY, INC., AND SEA FOOD COMPANY, APPELLANTS

VS.

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

NO. 769

L. O. JOHNSON, JR., AND SEA FOOD COMPANY, TANAS HEBERT ET AL. APPELLANTS

VS.

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR APPELLANTS

In presenting this brief to the court, we ask its indulgence while we pause to shortly reply to the foreword of appellee in the brief on behalf of the Conservation Department of Louisiana.

It is true that the decision of the Supreme Court of the United States in the case of Louisiana vs. Mississippi, referred to in appellee's brief, gave to the State of Louisiana a very valuable strip of land off the southern shore of Mississippi, and it is equally true that for years before that decision, and for years after this decision, the fishermen of the Gulf Coast of Mississippi were able to earn a livelihood by fishing in these waters, even as it is also true that the result of this commerce has proven vastly beneficial to the coast of Mississippi; in fact, it is true that the very happiness of thousands of these citizens of Mississippi depend upon their ability to engage in this type of commerce with Louisiana.

But while the decision in the case of Louisiana v. Mississippi deprived Mississippi of this territorial authority over the land adjudicated, still long before this case was decided a great Chief Justice of the United States, in Gibbons v. Ogden, decided that we have a right to engage in commerce in Louisiana; that this right emanates from the constitution of these United States and is beyond the power of a state to attack or to regulate; that this right is not only traffic, but it is intercourse and comprehends not only navigation but comprehends every species of commercial intercourse among states and nations.

Builded upon this great pronouncement is the present prosperity and peace of these United States. It has knit us together as a people and has corrected one of the greatest defects in the old articles of confederation. While it has enabled some states to draw heavily from the resources and wealth of other states, it has at the same time stood as a protector of the commercial welfare of each state and if, as charged in the foreword, this commerce has enriched Mississippi to a small extent, we call to the court's attention that the same commerce has enriched and upbuilded a great city at the mouth of the Mississippi River, which city constitutes a great part of the wealth of Louisiana.

Always standing in the pathway of local jealousy, it has likewise always stood as a protector and a defender of those who are endeavoring to carry out the cherished desire of the fathers of our constitution, that is, intercourse between the states, and at this time it comes with ill grace on the part of the state of Louisiana to ask for a denial to us in this court of this great right when at the same time the wealth that has been created throughout these United States under the protection of this law is being requested to be taxed so that the welfare, the commerce and the well-being of Louisiana may be protected from the encroachment of one of our greatest vehicles of commerce, the Mississippi River.

Appellants' Reply to Points I and II, Brief Dpartment of Conservation of Louisiana, Pages 1-22.

These two questions are so inter-connected that we feel

that our reply to the brief of appellee can be more logical were these two points to be answered at the same time.

We pause here to respectfully suggest to the court that this court has many times held that in deciding a question arising under the constitution of the United States of America, that its decision is confined to the case before it. That therefore the language used, though general in character, will be limited to the case at issue. Euclid Ohio v. Amber Realty Co. 272 U. S. 365; 47 Sup. Ct. Rep. 114; Tyson and Brother v. Banton, 273 U. S. 418; 47 Sup. Ct. Rep. 426. And for this reason we respectfully present to the court that the cases cited in support of points one and two in the brief of appellee not only are not controlling, but in fact, in no wise resemble the case at bar or the issue presented in it.

Taking up these cases in the order in which they are cited, we respectfully call to the court's attention Smith v. Maryland, 59 U. S. 270. This case decided the right of the state of Maryland to regulate the manner in which oysters were taken in the waters of Maryland for the purpose of preventing the destruction of these oysters and the Supreme Court holding that the state held these waters and the oysters contained therein for the benefit of its people; had a right to regulate the manner in which the oysters were fished from the bottom of the waters. There was in this case no element of interstate commerce nor was there any question of any citizens of the state being privileged above any other citizens.

In the case of McCready v. Va. 94 U. S. 391, the question before the court was the right of Virginia to deprive

a non-resident and one not a citizen of the use of the oyster bottoms of the waters of Virginia. There was not only in the case no element of interstate commerce, or of the deprivation of one citizen of the state of rights given to other citizens, but in deciding the case this court expressly decided that the planting of oysters was on the bottom of the waters of Virginia was cultivation and had no relation to commerce.

In the case of Manchester v. Mass., 139 U. S. 240, the question before the court was the right of Massachusetts to regulate the taking of fish in the waters over which it held sovereignity. The law attacked gave no right to citizens of Massachusetts over citizens of any other states or country and the question decided by this court was simply that the state could exercise its authority by regulating the manner in which fish were taken for the purpose of conserving its natural resources, but in deciding the case, the court expressly held that not only was there no question of interstate commerce involved, but that no right given by the law to its own citizens was greater than the right given the citizens of other states; however, the court expressly refrained in this case from ruling as to whether or not the citizens of any state have a right to fish for swimming fish in the waters of other states, and this question is yet an open one in the forum of the court.

In the case of Geer v. Conn., 161 U. S. 519, there was one question before the court that was: "Can a state prevent its wild animal life, after being killed, from being shipped out of the state in order that the wild life may be preserved to the people of a state as a food supply for its

citizens?" And, in deciding this case, Mr. Chief Justice White distinctly stated that this law only remotely affected interstate commerce, and also called attention to the fact that there was a difference between internal state commerce and interstate commerce, using the following language:

> "Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the state, under the provisions in question, created internal state commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the constitution of the United States. The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court."

The case of Abby Dodge v. U. S., page 223 U. S. 166, involved a matter differing so much from the case at bar, in our opinion decides no question that could affect the decision in this case, and the case of Gratz v. McGee 258 Fed. 335, merely decided that the state of Missouri was the owners of clams at the bottom of navigable streams within her borders. This holding is no wise challenged by us in this proceedings.

In the case of LeCoste v. Department of Conservation, 263 U. S. 545, the question presented and decided was the right of the state of Louisiana to levy a severance tax as a requirement preceding the divesting of the title of the state to wild animals. This court merely decided that it had this right and that it could establish a system of col-

lecting this tax, even though the skins of the animals had been received by a distributor, but in deciding this case Your Honors were very careful to call to the attention of the litigants that the case was not decided on the question of the police powers of a state to condition the removal of wild game from the state and the limitation on this power by reason of the commerce clause of the Constitution, using the following language:

> "Whether the tax here involved might be upheld by virtue of the power of the state to prohibit, and therefore to condition, the removal of wild game from the state, we do not now consider; but dispose of the case upon other grounds. The commerce clause (article 1, section 8, clause 3) confers on Congress power to regulate interstate and foreign commerce, and therefore such power is impliedly forbidden to the states. "Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce." Pennsylvania v. West Virginia, 262 U. S. 553, 596, 43 Sup. Ct. 658, 67 L. Ed. 117, and cases cited: Kansas City Railway v. Kansas, 240 U. S. 227, 231, 36 Sup. Ct. 261, 60 L. Ed. 617; Brimmer v. Rebman, 138 U. S. 78, 82, 11 Sup. Ct. 213, 35 L. Ed. 862; Elmer v. Wallace, 275 Fed. 86, 90; State v. Ferrandou, 130 La. 1035, 1041, 58 South. 870."

Citing with approval, the case of State v. Ferrandou, 130 La. page 1035, in which case the Supreme Court of Louisiana, speaking through Mr. Justice Monroe, decided that a law similar to the law in question here was unconstitutional because of its attempted encroachment upon inter-

state commerce. We now pass to the question of how far a state may regulate and control the taking, subsequent use and property rights that may be acquired in shrimp, oysters and other fish, calling to the court's attention that in the law attacked here, that is, in both the oyster law and the shrimp law, no attempt is made by the state of Louisiana to conserve to its people by means of the sections of the law complained of, either the shrimp or the oysters as a food supply, or the heads and hulls of shrimp and/or the shells of oysters as a fertilizer, clutch or road building supply, and in ordre to present this question so as to differeniate it from the case of Geer v. Conn., supra, which is relied upon by the appellee, we present to Your Honors the following:

In the Geer case, the state of Connecticutt, through its legislature not only said in words that grouse were a valuable food supply to its people, but should be conserved for them but this was the effect of the statute enacted by the legislautre. It absolutely prevented any part of the bird from passing out of the state and effectually conserved it for the sole use of the people of Connecticut. Now, may it please Your Honors, what does the shrimp and oyster act do? What is the effect of these laws in conserving to the people of Louisiana anything of value to them as a food or a natural resource?

We stop here and call to the court's attention that the court will not be bound by the name that is given a law by a state legislature, or the mere declaration, as this is not conclusive upon the court, but when attacked it be-

comes a question for judicial determination. Tyson and Brother v. Banton, 47 Sup. Ct. Rep. 426; 272 U. S. 418.

Therefore, this court will look through the fine words with which the two laws complained of are clothed, and will examine into the actual result that may be achieved from the enforcement of these laws. We therefore, say that the sections of the laws complained of by themselves support the construction placed on the laws by the appellant and the evidence supporting the allegations of the bill of complaint with reference to the intent of the law. Analyzing the shrimp law, we find that provided a license is obtained, which it is undisputed that appellants applied for, and providing a severance tax per barrel is paid on the shrimp, it being undisputed that tender of this tax was made, that any resident of Louisiana, any firm or association composed of residents of Louisiana, or any corporation domiciled in or organized under the laws of Louisiana, operating a canning and packing factory or drying platform in Louisiana, can take, these shrimp from the waters of the state in unlimited quantities. (Record page 23.) If these shrimp are hulled, the same may be shipped from the state of Louisiana without restriction or reservation (record page 29) and after the hulls and heads have been manufactured into fertilizer or chicken feed the same may be shipped from Louisiana without restriction or reservation, and we right here call to the court's attention the affidavit of R. L. Colson (record page 127) which was introduced by appellant and shows that all of the hulls conserved in Louisiana were shipped out of the state in interstate commerce.

The effect of the sections of the statute complained of does not prevent extraordinary quantities of shrimp from being taken out of the waters; it does not require these shrimp to be used in Louisiana for all of the eatable portion can be shipped out of the state; it does not require that the by-products be used in Louisiana for all of it can be shipped out of the state, and in no wise, does it touch upon the question of conservation and preservation of the natural resources for the people of Louisiana or assist the people of Louisiana in utilizing these fish as a source of food. Its one and sole object is to utilize these shrimp as an object of commerce, looking always beyond the borders of the state and yet, at the same time, to burden, control and regulate this commerce by compelling its citizens to pack and clean the shrimp under disadvantages in Louisiana.

Taking up the oyster law, we find that provided these oysters are caught by a resident of the state, or a firm or association composed of citizens of residents of the state, or by a corporation domiciled in or organized under the laws of the state, having their factory or shucking plant or places of business within the state, that these persons after they have taken the oysters from the shell can, first, ship every oyster in Louisiana from the state of Louisiana. Second, and after the shell has been ground into chicken feed or railroad ballast or road building materials, can ship every shell in Louisiana out of the state, and furthermore, can do this without restriction as to the amount of oysters that they take from the public reefs and even though certain citizens of Louisiana, that is, corporations domiciled in Louisiana, composed of citizens of Louisiana, are pre-

vented from engaging in this traffic, unless they own a packing plant or shucking plant in the state, any of the other persons more favored by this law can import unlimited numbers of non-resident laborers into the state for the purpose of assisting them in destroying the resources of the state. (See original brief page 271.) The evidence bears out this fact as the proof offered shows without dispute or denial by the appellee that ninety-five per cent of the oysters themselves, all of the shells used for chicken feed and vast quantities of the shells used for railroad ballasts and road building materials are shipped out of the state. Therefore, the law does not assist in regulating the amount of oysters taken from the public reefs; it does not conserve to the people of Louisiana either the oysters as a food supply or the shells as chicken feed or railroad ballasts, nor does it even give to the citizens generally the exclusive right to fish and catch oysters, it only denies to certain persons this right.

We therefore respectfully suggest to the court that the question of preserving a food supply that was presented in the case of Geer v. Conn. supra., the question of regulating and preserving wild animal life, by requiring a tax to be paid, which was presented in the case of LeCoste v. Department of Conservation, supra. is not presented here. We make no argument that a state has not a right to preserve for its people wild game as a food supply, nor do we attempt to say that it has not the right to regulate the manner in which game shall be taken, to tax the taking of this game, or to do any act that will necessarily increase and conserve this food supply, but we do think that a state

cannot inject into interstate commerce the product of its wild life and then attempt to regulate and burden this commerce. The sections of these laws complained of have but one effect only, that is, to require a person, whether a resident or non-resident of Louisiana to can or pack the shrimp and oysters in Louisiana, even though by so doing the value is lessened and a greater burden is placed upon the citizens of other states, who receive the shrimp and oysters through the medium of interstate commerce. This we say that the state of Louisiana cannot do.

In the decision relied upon by the appellee, that is, Geer v. Conn. supra., LeCoste v. Conservation Department and McCready v. Va., the court, we believe, has gone the very limit to uphold the ownership of wild life by a sovereign state and its right to condition the traffic in this wild life, and in no one of these cases has the court intimated that it would yield to this right, even though it affected interstate commerce, but on the contrary the philosophy running through each decision is that there being two species of commerce, internal commerce and external commerce, when a state says to its citizens that you can take this game and use it in internal commerce and it is dealt in and bought and sold by its citizens with the knowledge that this traffic is confined to internal commerce, then no complaint can be made of the enforcement of a law preventing its shipment beyond the confines of a state.

As in the warning given in the LeCoste case, this court has always called to the attention of the litigants that even the most necessary and vital powers of a state and its most

precious right shall yield to the commerce clause, yet in the case at bar, we find that in the very beginning of this law the legislature of Louisiana gave its citizens and the citizens of other states a right to traffic in shrimp and oysters in interstate commerce; it gave them a right to traffic in the hulls and heads of shrimp and the oyster shells in interstate commerce, and the evidence goes to show that the sole purpose and thought of catching these oysters and shrimp is that they may be injected in interstate commerce.

We therefore respectfully submit to the court that the state of Louisiana cannot enjoy all the fruits that arise from its dealings with its neighbors; from its intercourse with its neighbors; from its commercial relations with its neighbors regarding these shrimp and oysters, and at the same time, burden and regulate this intercourse and commerce for if one has a right to ship and dispose of goods in interstate commerce, the right is given to him at the same time of choosing the most reasonable and economical manner of carrying on this commerce. The state of Louisiana may have the right to keep all of its oysters and shrimp within its borders; it may have the right to prevent any but citizens and residents from catching or selling these oysters and shrimp, but when it grants the privilege of catching and selling these shrimp as indiscriminately as is granted in the sections complanied of of the law attacked, then it cannot condition this right with an unconstitutional restriction. Hanover Fire v. Carr. 71 L. Ed. 372; 272 U. S. 494.

We therefore suggest to the court, that there are limits to the condition which a state can place upon the taking or

use of its fish and other wild life. It may use this power to conserve a food supply; it may use this power to regulate the manner of taking the game or fish; it may use this power to obtain a tax before the title is divested, as in the LeCoste case; or it may use this power to guarantee its people an ample supply of such wild life for food, but it cannot, under the guise either of its sovereign proprietorship or police power, interfere with commerce.

Right here, we call to the court's attention the sound logic of Judge Monroe in the opinion delivered in the case of state of La. v. Ferrandou, 130 La. 1035. This case involved the construction of Section 1 of Act No. 189 of 1910, which section is set out at length in the original brief of appellant. An examination of this section reveals that it is the same law, having the same effect of the sections of the two laws complained of in this case. If we take from the sections complained of in the laws attacked the words in which it is dressed, which words were taken from decisions of this and other courts when used by these courts in the preservation of entirely different rights from those claimed by the state of Louisiana and tear from it the subterfuge with which it is surrounded, we find that the law of 1926 is in substance the law of 1910. We find that the sections of the two laws attacked from the only reasonable construction that can be given these sections, as well as from the admitted construction given these laws by the appellee herein, seek to do one thing, that is, to compel the canning and packing of shrimp and oysters in Louisiana, even though it is the idea, thought and intention of the

state of Louisiana to inject these shrimp and oysters into interstate commerce.

Justice Monroe in construing this law, and we submit to the court that in-so-far as his construction of police power of the state is concerned, that this construction is binding on the court (Dorchy v. Kansas, 47 Sup. Ct. Rep. 8; 272 U. S. 306) said:

> "There can be no question, as it appears to us, that this is to impose a regulation upon interstate commerce (those who buy and sell and ship being engaged in that business, as well as the carriers, who merely transport their goods), for it is to lay an embargo upon the trader who may wish to ship a limited number of oysters, to be packed and canned elsewhere, whilst permitting another to ship an unlimited number, which have been packed or canned within the state, for any other purpose whatever. The only remaining question is whether such regulation is permissible, as incidental to the object which it is designed to accomplish. And that question, we think, must be answered in the negative.
>
> The states, for the enforcement of their quarantine and inspection laws, the right to enforce which is reserved to them by the constitution, may impose conditions which operate as regulations of interstate and foreign commerce; and so, in the legitimate exercise of their police power, which is a term of wide significance; but we know of no instance in which it has been held that a state may regulate such commerce merely that its revenues may be increased.

> "The right of a state to prohibit the possession, during a closed season, within its borders, of game birds, taken in other jurisdictions, was a question upon which the courts differed, until it was finally settled by an act of Congress authorizing the exercise of such power. People ex rel. Hill v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N. S.) 163, 128 Am. St. Rep. 528, 6 Ann. Cas. 353. The right of a state to prohibit, during an open season, the exportation of such birds, killed within its borders, was decided in the affirmative in Geer v. State of Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, and it was there held that:
>
> "'Although the killing of game and its sale within the state are allowed, it does not thereby necessarily become the subject of interstate commerce in the legal meaning of those words.'"

The prohibition was, however, general, and the court, additionally, held that:

> "The police power of the state to preserve game birds, as a valuable food supply for its people, justifies a statute prohibiting the transportation of such birds beyond the state, even if interstate commerce may be remotely affected."

Here, the apparent purpose is not to preserve a valuable food supply, but to secure to those so engaged, in this state, a monopoly of the business of packing and canning Louisiana oysters, thereby increasing the assessable property and revenues of the state.

In McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248, Waite, C. J., said:

> "The precise question to be determined in this case is whether the state of Virginia can prohibit the citizens of other states from planting oysters in Ware River, a stream in that state where the tide ebbs and flows, when its own citizens have that privilege. * * * There is here no question of transportation or exchange of commodities, but only of cultivation and production."

In Turner v. state of Maryland, 107 U. S. 38, 2 Supt. Ct. 44, 27 L. Ed. 370, a statute of the state of Maryland, providing for the packing and inspection, or marking without inspection, of tobacco, grown in that state, was held not to be in contravention of the commerce clause of the constitution of the United States; but the statute was general in its application and did not undertake to regulate shipments of tobacco with regard to the purpose of the shipper or consignee.

On the other hand, in Robbins v. Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, it was held that (quoting from the syllabus:)

> "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The negotiation, therefore, in Mississippi, of the sale of oysters, which are in Louisiana (and being lawfully sold there in open market), for the purpose of introducing them into Mississippi, is interstate commerce, and a condition, imposed by the law of Louisiana, that one buyer, in Mississippi, shall have his oysters shipped to him provided he

intends to make this use of them, and another buyer may have his shipped, provided he intends to make that use, is a regulation of that commerce, within the law, as we understand it, vesting such power of regulation in Congress; nor do we think that, as applied to this case, it affects the discriminating character of the regulation, that the oysters were bought in New Orleans, by defendant, and shipped by him to the canning company, in Biloxi, for which he purchased, or to which he sold them.

In Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, it was held that:

> "A state cannot, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of its own or of other states.
>
> "Now can a state, with reference to person engaged in interstate commerce, make discriminations in favor of those who patronize its industries and those who patronize the industries of other states."

We therefore respectfully urge upon the court that there are limits to which a state can go in regulating and controlling the taking, subsequent use and property rights of its natural resources; that this limit has been passed by the state of Louisiana in its enactment of the two laws attacked, and that the argument made and the cases cited by the appelle does not support its effort to go beyond this limit.

Appellants' Reply to Points III and IV, Brief Department of Conservation of Louisiana, Pages 22-31.

It is attempted by the appellee in support of its argument on these two points to take the position that the sections complained of in the laws attacked does not violate the Fourteenth Amendment, by denying to citizens of Louisiana the equal protection of its laws, citing in support of this contention McCready v. Maryland, 94 U. S. 391, Wharton v. Wise, 153 U. S. 155. In both of these cases no question was involved of a statute favoring one citizen of a state over another citizen of the same state; the only question involved was the right of the state to preserve to its citiezns and to its residents the privilege of taking or planting oysters in the waters of the state. These cases did not decide that the state of Virginia could prevent one of its citizens over another of its citizens, but it did decide that it could prevent a non-resident from wihtout its authority taking the property of Virginia against a prohibition of this right.

The case of Lubetich v. Pollack, 6 Fed. 237, decided this same question, that is, that a state could forbid an alien from fishing in its waters, but the point raised by the appellant presents an entirely different state of facts and no case has been cited by the appellee contravening the position of appellant. For instance, in the shrimp case, any resident of Louisiana, any association or corporation composed of residents of Louisiana, or any corporation domiciled in Louisiana, having a packing or canning plant or a drying platform, may take oysters from the waters of

the state in unlimited quantities; however, this right is denied to appellants, who are citizens of Louisiana by virtue of their incorporation and domicile, because they do not have such a packing or canning plant or drying platform. In other words, if the appellants were equipped in every possible way to catch and transport oysters if they complied or offered to comply with every term of the act loking towards the conservation of natural resources of Louisiana, they would be prevented from engaging in any part of the shrimp business unless they were equipped with a plant for canning the shrimp or a platform for drying the shrimp.

We can suppose, for instance, that the appellants had contracted to catch and to deliver to a factory in Louisiana thousands of barrels of shrimp. If the Foster-Fountain Company were an individual resident in Louisiana it would have this right and could carry out this contract. If it were an asociation composed of residents of Louisiana it could carry out this contract, or if it had a few hundred dollars invested in a drying platform it could carry out this contract, but, although it is incorporated in Louisiana, and has a domicile in Louisiana, under the restrictions of the sections complained of, it would be prevented from carrying out this contract. None of the cases cited by the appellee sustain this right of the state to discriminate between its citizens. It may deny to outsiders the right to fish in its waters; it may deny to alien residents in its state the right to fish in its waters, but it cannot deny this right to its own citizens or discriminate between classes of its citizens. This requirement is purely abitrary because it does

not tend towards decreasing the amount of shrimp taken from the waters, does not tend towards the enforcement of the valid features of this act, does not yield to the state of Louisiana greater wealth as a severance tax and does not preserve to the people of the state a food supply. It is purely an arbitrary classification of its citizens into that class that can fish and transport shrimp and that class that cannot fish and transport shrimp.

We find the same evil in the oyster act in the sections complained of, except that the evil here is greater. This act actually deprives a citizen of Louisiana, that is, the Sea Food Company, a corporation domiciled in Louisiana and composed of citizens of Louisiana, from fishing, transporting or canning oysters, although it allows non-residents and aliens this privilege. (See original brief page 271.) This we say, that the state cannot do, without denying citizens of this state the equal protection of its laws. Supporting our position as against the citations of authorities made by the appellee, we cite to the court the case of Miss. v. Jim Hill. 53 So. 411. The decision in this case denied the right of the Board of Supervisors of one county from denying to the citizens of another county the right to fish in the waters of the state.

The case of Charles Gustafson v. state of Texas, 43 L. R. A. page 16, the appellant was convicted of violating statutes of the state of Texas, which restricted the right of its citizens to take fish from the waters of the state of Texas, in this case oysters, to those who had obtained a license and prohibited the issuance of licenses to any one except to those who were taxpayers.

In his opinion, Mr. Chief Justice Henderson, as organ of the court says:

"But it is contended here that the right to take the oysters in the public waters of the state is a privilege which the state can bestow as it pleases; that it can lease or let its public domain on whatever terms it sees fit. We cannot assent to this proposition. It might be so in a kingly government, but not in a free government in which all are equal before the law. * * * The state has no right to discriminate against any citizen or class of citizens as to the enjoyment of its public domain. The state has no more right to authorize one class of its citizens, to rent or use its public lands. We do not believe it could be seriously contended that the state could authorize only taxpayers to rent its public domain of lands, to the exclusion of another class of its citizens who were not taxpayers. This would not only be a discrimination, but discrimination in favor of the rich as against the poor. If the state could authorize its citizens who were taxpayers to fish, and inhibit its citizens who were not taxpayers from fishing in its public waters, it could equally authorize its citizens who were not taxpayers to fish in such waters to the exclusion of those who were taxpayers. * * * The fact that it is class legislation qualifies the act, or that provision of it authorizing the granting of a license, and so renders it unconstitutional and void. We hold that the waters of the state, as well as all its domain of public lands, are equally open to all of its citizens upon the same terms and conditions, and that the attempt of the legislature to prohibit residents of the state who are not taxpayers, but who are willing to pay li-

cense tax, from fishing in the public waters of the state, is violative of these provisions of the constitution before mentioned."

The principle was equally upheld by the Supreme Court of the United States in the case of Gulf, Colorado and Santa Fe Railway Co. v. Ellis, 165 U. S. 150, and the case of Yick Wo v. Hopkins, 118 U. S. 356, and numerous other cases cited by the appellant in its original brief.

We therefore with respect suggest to the court that the state of Louisiana cannot deprive one of its citizens of a valuable right in favor of other citizens merely because of the difference in ownership of property of these citizens. That this attempt cannot be upheld as a regulation of the taking of wild life, or as a conservation of its natural resources as it tends to do neither, nor can the possession of the utilities require possible effect the conservation of its resources, and therefore the classification is a purely arbitrary one which it is not within the power of the state of Louisiana to make and in making this classification it has violated the Fourteenth Amendment to the Constitution of the United States, and this violation is not excused or explained in the authorities cited by the appellee in support thereof.

Appellants' Reply to Point V and VI, Brief Department of Conservation of Louisiana, Pags 31-48.

Under these points the appellees take the position that a state may regulate interstate commerce by reason of its ownership of wild life before this wild life is reduced into

private possession and traded in so as to make it an object of commerce. We respectfully call to the attention of the court that the basis of the argument of appellees in support of this position is the assertions contained in the Act, they seem absolutely to ignore either the purpose of the Act as expressed by the Act itself, or the often expressed ruling of Your Honors that you will not be bound by a mere legislative declaration, but will look into all of the facts contained in the record to see if there is any basis for these declarations. Tyson and Bros. v. Banton, 47, S. C. R. 426, 273 U. S. 418. We shall therefore pause here and look into the record of this case to see if it substantiates the bold position taken by appellees.

That appellees state that the legislative acts declare that the oyster shells and the shrimp hulls are valuable as natural resources, admitting that they are of intrinsic value, has the state, from this reason alone, the right to burden the rest of the world in their use of these articles after the state has parted with its title by levying a severance tax and have invited, by its legislative act, the balance of the world to share in the use of the products of its natural resources.

The evidence shows and the appellees frankly admit that every shrimp and every oyster caught in Louisiana, save for an insignificant amount used locally, are intended to go out into general commerce. The act itself specifically authorizes this commerce and recognizes the validity of it. In other words, when a fisherman takes his net in St. Bernard Parish and goes out into the waters of the Gulf of Mexico for the purpose of reducing shrimp to his possession, he

does so knowing that the fruits of his quest would be valueless to him unless he were able to sell the shrimp to some person who intended to use same in commerce. From the very moment that the shrimp are caught, as shown by the record, there is a continuous movement in commerce, first, the shrimp are transported on navigable waters to a factory; at this factory, after the severance tax is paid, they are converted into canned food and are packed in cases for shipment. While this process is taking place, orders are sent from all over the United States to the owner of the factory and the shrimp are then placed in cars or on boats and shipped in interstate commerce. The same process applies to the head and hulls after the same are reduced to a bran, and therefore there is never a thought of any use of these shrimp from the time they are caught except a desire to inject the same into commerce. Therefore, the only value that they posses as a natural resource is a value that is obtained by reason of their sale in interstate commerce, and the question is presented to the court as to whether or not the state of Louisiana can go to the balance of the world and say in substance as follows: Nature has provided us with a wonderful supply of shrimp and oysters which are fit for human consumption and which have a valuable by-product to-wit: Chicken feed and shrimp bran. The supply is entirely too large for this state to utilize and it is of no value to us unless we can deal with you and exchange these shrimp for your money and products. We are willing to sell to you without restriction unlimited quantities of shrimp and oysters, in fact all the shrimp and oysters our fishermen, or non-resident fishermen employed by our corporations, can catch, and then after the balance

of the states have agreed to buy their products, say to the balance of the world, however, there is a condition that we attach to your buying these shrimp and oysters, that is, although commerce with you has given these articles their sole value, although we have exacted first a severance tax on the shrimp and oysters, and although we have provided that only our people can engage in the business of catching the same, you must bear another burden, that is, regardless of how it affects you in your use of these articles, or the price you pay for these articles, they must be canned and packed in Louisiana so that thereby all the wealth that comes from or out of these articles in interstate commerce must remain in Louisiana. We want the very last pound of flesh so that when the trade balance is struck between us every item will be in our favor. By the argument of appellees this is the stand taken in support of the sections of this act which are complained of. Following up this line of thought to a conclusion it is reasonable to say that if Louisiana can condition commerce in shrimp and oysters solely because they originally were the property of Louisiana so as to interfere with interstate commerce in compelling the raw material to be manufactured in Louisiana, even though the purpose of manufacture is for interstate commerce, and such commerce has in fact started there, the state of Louisiana would have the right to say that no person could purchase these shrimp or oysters unless for a designated use, or they would have the right to say that only citizens of certain states might purchase same. For the very argument of the appellees is that there is no limit to the conditions that can be lawfully imposed by the state of Louisiana for the reason that the general law applying

to commerce among the states is enactive if this commerce consists of the natural product of the state.

The appellees in their brief contend for this construction in using the following words: "The commerce rules does not contemplate the fisheries within a state * * * it contemplates the industries as distinguished from commerce that arises out of or rather is part of the fisheries."

In this contention they are supported neither by any direct decision of this court, or by the reasoning in any decision of Your Honor's in any other case, and in the whole jurisprudence of the United States, this thought has been frowned upon except in the case of Alabama vs. Harrub, 15 L. R. A. 761. Against this line of thought we first find the declaration of its own highest court, for in the case of said Louisiana vs. Ferrandeu, 58 Southern 870, Justice Monroe, one of the most illustrious characters who ever adorned the bench of the state of Louisiana, thoroughly considered every argument advanced here by the appellees and decided adversely to these arguments.

In as much as Your Honor will be governed by the decision of a state court in defining its police powers, Dorchy vs. Canders, 47 Supreme Court Reporter 278, 272, U. S. 306, this decision destroys the claim that the state in enacting the law complained of was acting within the scope of its police powers. Furthermore, coming up to the very question that is raised here by the appellees, with a line of thought controlled by the pure logic, the learned Chief Justice decided against the position of the appellees in the following language: "The negotiation, therefore, in Missis-

sippi, of the sale of oysters, which are in Louisiana (and being lawfully sold there in open market,) for the purpose of introducing them into Mississippi, is interstate commerce, and a condition, imposed by the law of Louisiana, that one buyer, in Mississippi, shall have his oysters shipped to him provided he intends to make this use of them, and another buyer may have his shipped, provided he intends to make that use, is a regulation of that commerce, within the law, as we understand it, vesting such power of regulation in Congress nor do we think that, as applied to this case, it affects the discriminating character of the regulation, that the oysters were bought in New Orleans, by defendant, and shipped by him to the canning company, in Biloxi, for which he purchased, or to which he sold them."

The case of Geer vs. Connecticut, 161, U. S. 519, gives no further comfort to the appellees on this question, for in deciding this case the court specifically pointed out that even as the state could control this wild animal life at its source, it could also control internal commerce in the same by limiting all commerce to internal. It cited with approval the California case where the lines between these two forms of commerce were so plainly outlined, and nowhere in the whole decision is there any suggestion that it affected interstate commerce except in the very remotest degree. A part of the language used by Chief Justice White in this case is as follows: "In view of the authority of the state to affix conditions to the killing and the sale of game predicated as this power is on the peculiar nature of said property, and its common ownership by all the citizens of the state, it may well be doubted whether commerce is

created by an authority given by the state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state." There would have been a different question presented, and in our opinion a different decision rendered, had the Connecticut law provided that the meat of the bird and its feathers, when manufactured in the state into food and clothing, could be shipped without restriction in interstate commerce, for, as Your Honor will notice in the above quotation, the court said that commerce was not created provided a warning was given that the possessor could not engage in this commerce.

In the instant case more than permission is given, an invitation is given by the very act itself, to engage in commerce without the borders of the state. The learned Chief Justice also noted with approval Mr. Chief Justice Marshall in Gibbons vs. Ogden, 9 Wheaton, 194, as follows: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, and between different parts of the same state, and which does not extend to or affect other states.

Therefore, we suggest to the court that running through this entire decision is the rule that the matter did not embrace interstate commerce, and that in deciding the case there was involved no question of interstate commerce.

The same distinction runs through the case of Lacoste vs. The Department of Conservation, 263, U. S. Page 545,

for in deciding this case therein hold that the State of Louisiana had a right to collect a severance tax even to the extent of making a dealer responsible for this tax, the court paused and distinctly stated that the state, neither under the police powers nor under the highest right it possesses, the power of taxation, could in any manner interfere with interstate commerce. Citing with approval the case of State of Louisiana vs. Ferrandau, Supra, in which case Justice Monroe had given the same utterance. We therefore state to the court that when one deals in a article within the borders of a state, Your Honor will not make such a fine distinction between internal commerce and external commerce, as to say, that up to a certain point, that is, in the instant case, up to the time that the oysters and shrimp are placed in cans and up to the time the hulls and shrimp are manufactured into grit and fertilizer, however, comprehensive as it may be, regardless of the extent of this commerce, it is internal commerce, but the moment the hulls of the shrimp and the shells of the oysters are removed it becomes general commerce subject to the restrictions of the commerce clause of our Constitution.

Unless the court can make this distinction, unless it can place this construction upon the law, to which extent Your Honor have never yet gone, unquestionably the law is a regulation of interstate commerce and void, and we call to the attention of Your Honor that the reasoning of Justice Monroe in the Ferrandau case, Supra, is more in line with the splendid thought of the Supreme Court of the United States since the date of Gibbons vs. Odgen, that

is, the reasoning in the case of the state of Alabama vs. Harrub, 15 L. R. A. 761, cited in support of the contention of appellees, this being recognized by Your Honor in taking the opposite view of the matter in your decision in the case of Lacoste vs. Conservation Department, Supra, wherein Your Honor selected the Louisiana case as a citation, rather than follow the idea announced in State of Alabama vs. Harrub, Supra.

The appellees recognized this when they dismissed the Farrandau case without attempting to differentiate this case and the principles announced therein from the case at bar, except in so far as they state that the Farrandau case decided another point, that is, that no person could ship oysters for canning out of the State of Louisiana. They admit that this would be a regulation of commerce, and such regulation would be invalid.

We therefore say to the court that in making this acknowledgement that the appellees admit themselves out of court. That there is no difference between the two statutes except in the words used, which in the 1926 law complained of are meaningless. The object and purposes of the law of 1910 was plainly expressed. It forbade the shipment from Louisiana of the oysters for canning, in the statute here attacked while this purpose is attempted to be concealed, yet it is plainly apparent that this is the purpose of the law and the sole object of the law. Furthermore, may it please Your Honors, if the State of Louisiana can allow traffic in unlimited quantities of oysters and shrimp purely because of her original ownership of these oysters and

shrimp, yet with a condition always attached that they shall not be sold in interstate commerce, and this regulation would be valid, why could it not say that the title to the oysters would pass to one man provided he agreed not to manufacture the oysters into food, but to use it in its raw state, and say to another man that the title would not pass to him if he expected to manufacture the oysters into food unless they were manufactured in Louisiana? If the sole object of the first was to prevent competition in the manufacture of oysters, and to enrich Louisiana by the added taxation arising from factories, then we say to the court that the sole purpose of the law here attacked is the same, and unless there is a limitation to the State of Louisiana in encroaching on interstate commerce in conditioning the removal of its title to game, there is no limitation that could be placed upon the conditions imposed by the State of Louisiana in allowing external commerce arising from fishing in its waters, and if such commerce cannot be conditional and the statute of 1910 was void because it was an interference with interstate commerce, and this was admitted by the appellees, then the statute here attacked is void because it interferes with interstate commerce, because any attempt on the part of a state to limit, regulate or restrict commerce between states is void. We cited in support of this statement the case of Brimmer vs. Rebman, 138, U. S. 78, and the cases found from Page 109 to 137 of the original brief.

Counsel for the Department of Conservation of the state of Louisiana call attention on page 44 to the use of hulls in the state provided by the act. It will be noted that

there is no requirement under section 8 of the act hat after the oysters are taken from the reefs to a factory for canning, the same be at any time returned to the reefs for clutch. The proof in the case established without controversy that as to the portion of the Louisiana reefs east of the Mississippi river, such reefs contain millions of old oyster shells, and that the Department of Conservation, instead of requiring them to be kept there as clutch, was actively engaged in selling them to private individuals, who manufactured the same into some kind of commodity and was shipping the same out of the state not only without interference or obstruction but with the permission of the Department, express or implied. See the following affidavits: Ernest Desporte, Jr., 769 Tr. 39-40; Taltubal 769 Tr. 80-84; Louis Braun 769 Tr. 44; C. B. Foster 769 Tr. 76. Each of the foregoing affidavits also establish the fact, beyond controversy, that only a very small portion of the actual oysters are consumed in the state of Mississippi, and practically none of the by-products of oyster shells.

Calling Your Honors' attention again to the fact that the law is not a conservation measure, we direct Your Honors' attention to the affidavit of James N. McConnell, director of the Oyster Division of the Conservation Department, filed in cause No. 769, Tr. 87, which contains the following language: (Tr. 88).

> "The provisions of this law, which law was adopted in the legislative session of 1926, these provisions applying to the prohibition of the exportation of oysters in the shell from Louisiana, did not go into effect until January 1, 1928, this

being done to give the oyster canning factories in Mississippi an opportunity to acquire sites and build their factories in Louisiana.

"A similar provision in the shrimp law of Louisiana brought several of the shrimp canning factories into Louisiana where they might enjoy the natural resources from the waters of Louisiana.

"There are many sites in Louisiana that would be suitable for the erection of oyster canning factories in this state. Dunbar-Dukate Company has bought a site at Slidell, Louisiana, to which he intends to move his Biloxi, Mississippi canning factory as soon as this Louisiana law governing oysters is enforced.

"The Conservation Department of Louisiana is prepared to enforce this Louisiana law and has been enforcing it against everyone until restrained in this case by the court order."

In other words, there is no contention that the purpose of the law was to lessen the number of oysters or shrimp which would be taken out of the state. Upon the other hand, the act was intended to be and is construed as an invitation to industries in other states to remove to Louisiana territory so that they may enjoy without limitation or restrictions, the right of removing shrimp and oysters from the state.

But recurring again to the question of clutch, we call your Honors' attention to the foregoing quotation from the affidavit of Mr. McConnell, wherein he uses the following language:

"There are many sites in Louisiana that would be suitable for the erection of oyster canning factories in this state. Dunbar-Dukate Company has bought a site at Slidell, Louisiana, to which he intends tomove his Biloxi, Mississippi Canning factory."

Your Honors will notice from the map that Slidell, Louisiana, is forty miles from the reefs were the oysters would be taken from, and it is certainly a stretch of the imagination to say that one of its factories would take the shells of the oysters and carry them back to the reefs as Clutch. Such was not the intention of the act; there is not a hint or suggestion of any duty upon the part of a factory separating the shells from the oysters that the same be taken back to the reefs. In fact, the act was careful not to impose any such duty upon its industries. To do so would place them at a disadvantage in the interstate competition for the sale of its commodity.

But not only that, section 3 contains the following language:

"And after said oysters all have been removed from the shell, within the State of Louisiana, such lawful taker or possessor, his heirs or assigns, as the case may be, shall be vested with all of the rights and property of the State in and to said oysters and shall have the right to sell such oysters or ship the same beyond the limits of the State, without restriction or reservation, and when the raw oyster shells herein described shall have been used for the purposes herein stated the right of property therein theretofore

existing in the State shall pass to the lawful taken or then possess of such oyster shells."

The law emphasis upon the fact that the act has no relation to the conservation of natural resources, evinces no purpose to reduce or diminish the number of oysters or shrimp which may be caught from the waters or taken from the reefs, provided they are packed or canned in the state of Louisiana.

Appellant's Reply to Point VII, Brief Department of Conservation of Louisiana, Pags 45-48.

In the argument of appellee under this point the position is taken that the right to fish oysters or shrimp is not a property right, and a denial of the right to engage in commerce with reference thereto by contracting for such commerce is not protected by the Fourteenth Amendment to the United States Constitution, and in support of this position the appellee contends that no right to contract with reference to a natural resource is given to any citizen of a state owning such natural resources, except in the manner and to the extent permitted by the laws of the state owning such natural resource.

Opposing this position, we respectfully call to the court's attention that the appellant, Foster-Fountain Company is a corporation organized under the laws of the State of Louisiana, and the appellant, Sea Food Company, is a corporation organized under the laws of the state of Louisiana, domiciled in said state, with a majority of its stock held by resident citizens of said state. (record page

70). Therefore, under the ruling of this Honorable Court these corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States, providing equal protection of the law. Southern R. R. Co. v. Greene, 216 U. S. 400, 54 L. Ed. 536; Santa Clara County v. Sou. &c R. Co. 118 U. S. 394, 30 L. Ed. 118, Pembina Consol. Silv. Min. Co. v. Penn. 125 U. S. 181, 31 L. Ed. 650; Charlotte &c. R. Co. v. Gibbons, 142 U. S. 386, 35 L. Ed. 1051; Covington &c. Tpk. Road Co. v. Sandford, 164 U. S. 578, 41 L. Ed. 560; Gulf R. Co. v. Ellis, 165 U. S. 150; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819. This being true the fish, game or other wild life of the state of Louisiana is held by the state of Louisiana as a trustee for the people of the state, that is, for its citizens, which trust must be administered without discrimination among them.

In Gratz v. McKenzie, 258 Fed. 338, (Eighth Circuit Court of Appeal) Mr. Justice Garland, as organ of the court, said:

> "Fish, generally speaking, on account of their migratory character and for want of a fixed habitat, are classified as animal ferrae naturae. Their ownership, while they are in a state of freedom is in the State, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common and the ownership may not be claimed by any particular individuals. 11 R. C. L. 1015; State v. Heger, 194 No. 711; State v. Weber, 205 Mo. 36; 10 L. R. A. (N. S.) 1155.

In Smith v. Maryland, 18 How. 71, Mr. Chief Justice Curtis on page 74, said:

"Whatever soil below water mark is the subject of exclusive propriety and ownership belongs to the state, on whose maritime border, and within whose territory it lies.

* * * * * But the soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell as floating fish."

Therefore, if the state of Louisiana held title to its fish and game as a trustee for all of its citizens, it could not discriminate as between these citizens, unless this discrimination was for the purpose of protecting the majority of its citizens, or for the purpose of prescribing regulations to promote the health, peace, morals, education or good order of the people and, unless there was such a reason for the enactment of this law here attached, any effort on the part of the state of Louisiana to prevent the appellant here from contracting to sell and selling, or from catching or shipping oysters and shrimp caught from the public reefs of the waters of their property, that is, their right to contract takes their property without due process of law, as well as deprives them of the equal protection of the law. The appellees cite in substantiation of their position the case of New Orleans v. Water Works Company, 142 U. S. 79. In this case this Honorable Court decided that in-as-much as a municipal corporation was a public corporation and not a private corporation, that any contract made by it in-so-far as its rights under the contract were concerned, were subject to change by legislative enactment for the reason that the corporation itself, being a creature of the legis-

lature, must always respond to the will and desire of the legislature. Furthermore, the very contract that was urged in this case had been held by the Supreme Court of Louisiana to be an invalid contract and this Honorable Court held that the ruling of this state court of Louisiana on this subject was decisive.

In the case of Barbier v. Connolly, 113 U. S. 27, the question before the court was the right to restrict the activities of certain businesses in certain sections of San Francisco. It appeared to the court that there was a necessity for this regulation and it applied equally to all persons similarly situated and engaged in the same business. There was nothing before the court to show that there was an arbitrary classification, but on the contrary, there was every reason to beleve that it was necessary to make this regulation of certain classes of business.

This rule was announced in the above case in the following language:

> "Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In the case of Atkin v. Kansas, 191 U. S. 207, the question before the court was the right of the state of Kansas to enforce a law governing the hours of laborers employed on public works, and in deciding this question this Honoroble Court used the following language:

> "We have no occason here to consider these questions, or to determine upon which side is the sounder reason; for whatever may have been the motive controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one underatking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to precsribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has the authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

There was no semblance to the case at bar in this case and the same question was decided in the case of Hine v. McCall, 239 U. S. 175.

These cases did not cover a situation where a state holding property in trust for all of its citizens arbitrarily discriminated against some of its citizens in favor of others, in fact, the laws complained of in both the cases above cited were for the equal protection of all the citizens of the state and were for their equal advancement and service. There was no attempt there to say to one contractor that you can employ laborers ten hours a day, or you can employ alien labor provided you are equipped with certain tools, or certain conveniences for employing this labor, and to say to another contractor because it happened to be a corporation that you must work your men only eight hours a day and you must refrain from working aliens because you do not happen to possess certain equipment that we deem essential in properly using this type of labor for the additional length of time. This, Your Honors, is what the Louisiana statute complained of here does, for although, under the only construction ever given to the states ownership of its wild life, it holds this wild life in trust for all of its citizens. In the statute complained of by the appellants it denies the right to take, can, deal in or contract with reference to shrimp and oysters, unless the corporation so doing has a packing plant, drying shed or shucking shed situated in the State of Louisiana.

The applellees argue that there is a reason for this classification. The appellees say that this reason is that the state can require one fishing or dealing in oysters to have a shucking shed, or a packing plant, so that the natural resources of the state can thereby be better conserved, but if this be true why did not the law provide that resident

citizens or associations of resident citizens be compelled to have the same equipment?

The effect of this law is to absolutely deprive the appellants of their right to contract in any manner with reference to oysters. It would be unlawful for the appellants to contract with other citizens of Louisiana to go on to the public reefs of this state and buy oysters at the market price and to deliver these oysters to a packing plant lawfully operating at a price yielding a profit; the purchase of the oysters would be an unlawful act; the possession of the oysters would be an unlawful act, and the transportation would be an unlawful act, unless the appellants had equipped themselves with a packing plant or shucking shed which, under the above circumstances, would be useless to them. It therefore, can readily be seen that there is no reason for this classification, but that on the contrary, it is absolutely arbitrary and the Supreme Court of the United States in reversing the case of Gulf, Colorado & Sante Fe Railroad Company v. W. H. Ellis, 165 U. S. 150, used the following language:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court in Yick Wo. v. Hopkins, 118 U. S. 356, 369, 30: 320, 326: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we

are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal —that they are endowed by their Creator with certain inalienable rights, that among those are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision, as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and letter of which the former is the thought and spirit, and it is always safe to read the letter of the constitution in the spirit of the declaration of independence. No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * "

Therefore, we say that any citizen possesses a contract right to the fruits of natural resources when these fruits belong equally to all the citizens of a state, and that no condition precedent to reduction to private ownership is valid unless this condition be free from an intent to prefer one citizen over another, and that if the condition does prefer one over another it takes away from the one discriminated against a property right and takes from him his property without due process of law, as well as denies to him the equal protection of the law.

Appellants' Reply to Point VIII, Brief Department of Conservation of Louisiana, Pages 48-52.

Under this head the appellee attempts to sustain the position that proof of violation of a prohibitory law does not tend to show the unconstitutionality of that law as a denial of equal protection of the law to the extent that the state may be enjoined from enforcing the statute complained of. Upon this point we wish to call to the court's attention again the fact that the appellant does not complain of a surreptitious violation of this law by any citizen of the state of Louisiana, but the complaint is levied against a scheme for its violation, which the appellants say begun in the very legislature which enacted this law.

We call to the court's attention the affidavit of B. Taltavull, found on page 83 of the oyster record. This proof shows that when certain citizens of Louisiana, engaged in that type of business known as the raw oyster business, went to Baton Rouge to oppose the law, that they were told that the law would not injure their business for the reason it would not be enforced against them. This affidavit was introduced in evidence and no evidence thereto was introduced on behalf of the appellees.

We further call to the court's attention the affidavit of J. R. McKinnon, found on page 72 of the oyster record, and of D. J. Goodin, found on page 61 of the oyster record. These affidavits show that the affiants had spent over a week in New Orleans; had gone into the places of business of all of those persons who were engaged in shipping raw oysters for use in their raw state; had talked to these per-

sons; been quoted prices by them; had been told that they would sell and deliver to them oysteres to any place in any state, and in any quantity. The affiants further stated that, although they had become intimately acquainted with the details of this business, that is, the raw oyster business, and although it was a large and growing business, embracing commerce in many barrels of oysters a day that at no time did they see any effort on the part of the Conservation Department of Louisiana to enforce this law; that no inspection was made of these oysters shipped in a raw state in interstate commerce, and no inspectors were placed in the neighborhood where this business was conducted for the purpose of enforcing this law, in fact, as far as the record shows the Conservation Department of the state of Louisiana absolutely ignored this unlawful traffic in raw oysters. There was no denial by the Conservation Department of this charge that they had no inspectors overlooking this traffic, except a denial in general terms. There was no affirmative statement that their inspectors were charged with an observation of any attempted violation of this law by the raw oyster dealers, yet, at the same time, the evidence on the part of appellants, without denial from appellees, was to the effect that the minute the oyster law went into force, that men were placed on boats by the Conservation Department of the State of Louisiana; that these boats were cruising the waters of the State of Louisiana alert for any violation of the oyster law, threatening at all times to arrest any violation of the oyster law, to imprison the violators and to confiscate the boats and equipment used by them in the violation of this law.

In the shrimp case, we find the affidavit of twelve Louisiana citizens (record in shrimp case page 60). In this affidavit these citizens of Louisiana state that of a knowledge born from years of fishing that all shrimp caught in Louisiana were caught in the inside waters of the state. We find the affidavit of L. J. Folse (shrimp record page 106). That these shrimp have been shipped in a raw state from Louisiana in large quantities, that the business is a growing business and that there was no effort on the part of the Conservation Department to prevent this business. It is true that the appellees deny this in general terms, but this denial is unaccompanied by any offer to show that there is an inspection of this business of the same rigorous character that the record shows was enforced against the persons catching shrimp intending to export same to Mississippi for canning. Certainly, we do not contend here that just because a law is violated by one person or by a number of persons that some other person prosecuted under this law would have a right to enjoin its enforcement.

Therefore, the illustration made by the appellee of the Volstead law or gambling law has no bearing here, but we do say and urge upon Your Honors that where a state attempts to place certain restrictions upon the carrying on of any occupation or in prohibition of any occupation or calling and enforces its laws only against one class of its citizens and ignores entirely another class of its citizens, then such discrimination exists as to justify this court in declaring the act complained of unconstitutional because of its manner of enforcement.

In point 4 of our original brief, beginning at page 209, we presented to Your Honors the view that the acts as construed and enforced by the Conservation Department of the state of Louisiana, charged with enforcement thereof, violated the 14th amendment to the constitution of the Untied States, as well as the commerce clause by reason of the fact that such acts were enforced and construed by the department whose duty it was to enforce the same as only applying to oysters or shrimp being shipped out for the purpose of packing or canning beyond the limits of the state.

We have referred Your Honors to the testimony in support thereof, and cited an abundance of authority.

Counsel for appellee cite the case of Mackey Cable Co. v. City of Little Rock. 250 U. S. 94, 63 L. ed. 863. In that case the city of Little Rock imposed a license tax upon telegraph poles. A similar ordinance but separate one imposed a similar tax on other poles used in the state. There was an effort made to enforce the tax against the appellant but no effort had been made to collect the tax from the owners of other poles liable for the tax. This court held the fact that other persons had not been sued was not determinative against the liability of the appellant in that case, using the following language:

> "Nor is there ground for holding that plaintiff in error is subjected to unreasonable discrimination, in contravention of the equal protection clause of the 14th Amendment. The case shows that its franchise ordinance imposes the same and no greater tax than that which is applied by a gen-

eral ordinance to other companies maintaining poles in the city. The offer of testimony to prove that the two other companies were not in fact required to pay the tax upon so many of their poles as stood upon railroad rights of way went no further than to show that the general ordinance had not been enforced against them in the same manner that it was proposed to enforce the franchise ordinance against plaintiff in error. There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance, as in Yick Wo. v. Hopkins, 118 U. S. 365, 374, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064."

In this case, however, we have shown, beyond peradventure, that the department of the state of Louisiana charged with the enforcement of the act, by a uniform course of construction, is so enforcing and construing the language as only applicable to persons shipping shrimp and oysters from the state to be packed or canned. In other words, a corporation or individual or a partnership is permitted to ship the shrimp and oysters in the hulls and the shells in unlimited quantities and without restriction, supplying the demands of the fresh shrimp and oyster trade, but that neither an individual nor a corporation, although the corporation may be a Louisiana corporation owned by Louisiana citizens, having the right to do so under its charter, is permitted to ship out shrimp or oysters to be packed or canned out of the state.

We reiterate the argument contained in our original brief, that the act is being construed and enforced as if

the same was identical in language with the 1910 act stricken down in the Ferandau case.

In addition to the cases cited in our original brief, in the more recent case of F. & D. Co. v. Tafoya, 270 U. S. 426, 70 L. ed. 664, the following language is used:

> "It is suggested that the district court had no jurisdiction because the bill does not allege that the statute is unconstitutional, but only that the statute as construed and applied by the defendants is so. But even if the statute did not plainly purport to justify and require the threatened action, or if the bill fairly taken did not import a denial of the constitutionality of the law as applied to this case, the plaintiff still would be entitled to come into a court of the United States to prevent such an alleged violation of its constitutional rights. Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Css. 757; Home Telep. & Telg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 53 Sup. Ct. Re. 312; Cugahoga River Power Co. v. Akron, 240 U. S. 462, 60 L. ed. 743, 36 Sup. Ct. Rep. 402."

And we respectfully refer Your Honors to the cases cited in the foregoing opinion last above mentioned. They are directly in point and support the contention of the appellant.

Appellant's Reply to Point IX, Department of Conservation of Louisiana, Pages 53-59.

The appellees take the position under this point that the charters granted to the Sea Food Company and to the

Foster Fountain Company did not prevent the State of Louisiana from thereafter with-holding rights granted under the charters, if in with-holding these rights the state was acting within the scope of its police powers, we here call to this Honorable Courts attention that while the charter of the Foster Fountain Company only grants a general right to the Foster Fountain Company to pack and sell and generally deal in commerce in can goods including shrimp and oysters; that the charter granted to the Sea Food Company by the State of Louisiana especially gave the right to the Sea Food Company to import and export shrimp and Oysters, the right being given in the followning language: "To buy, sell, can, import and export oysters, shrimp, fish, fruit and vegetables; to buy, operate and run boats and seines necessary to catch said shrimp, oysters and fish." Record Page 22. We call to this Honorable Courts attention here that there is no provision cited by the appellees under the laws or the constitution of the State of Louisiana which provides that the state has a right at any time to annul, amend or abridge contracts between it and corporations evidenced by the charter rights given corporations, except that there is a provision of the State of Louisiana which provides that the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general welfare of the state. In other words, unless the law in question here is a valid exercise of the police powers of the state of Louisiana looking always with reference to the peace, morals, welfare and safety of its citizens, then the exactment of this law can not annul or abridge rights given to a corporation under its

charter. Russell v. Sebastin, 233 U. S. 195, 58 L. ed. 912; Dartmouth College v. Woodward, 4 Wheat. 518 4 L. ed. 629; Miller v. People of N. Y., 15 Wall. 478, 21 L. ed. 98; Chicago B. & Q. R. R. Co. v. Cutts, Attorney General, et al, 94 U. S. 154, 24 L. ed. 94. We therefore respectfully present to the Court that in as much as this Honorable Court has time after time held that the opinion of the Supreme Court of the State construing its statutes will be binding upon this Honorable Court, then the decision of the Supreme Court of Louisiana in the case of the State of Louisiana vs. Ferrandou would be decisive of this question, for in that opinion construing a law similar in effect to the present law, Judge Monroe said that it was not within the police powers of the State of Louisiana to pass a law and enforce a law, the effect of which was to prevent the shipment of oysters out of the state to be packed, while allowing oysters already canned and packed to be shipped out of the state. Furthermore, we state to this Honorable Court that the exactment of the law here questioned is not necessary to the general welfare of the state, and that to allow the appellant corporations to carry out the rights and privileges granted them under their charters would not infringe the rights of individuals of the State of Louisiana, and for these reasons the contract between the state and the corporations contained in the charters could not be affected by the cited section of the constitution of the state of Louisiana.

This conclusion naturally leads us to present to the Court that the fact that in the case of Texas and New Orleans Railroad Company vs. Miller, 221, U. S. 408, cited by

the appellees is not controlling of the question here presented to this Honorable Court.

In that case the legislature had done a monstrous thing. It had empowered the Railroad Company to operate a great business in the State of Louisiana wholly without any liability for the death of any employee however reckless or negligent it might be causing this death, it was not only the surrender of positive rights belonging to the employee, but it shocked every human sensibility. Therefore, in deciding this case, this Honorable Court said that it being the duty of the State of Louisiana to protect and safeguard the safety, health and morals of those within its jurisdiction, that it was without their power to insert such a provision in a charter, and not having this power that the provisions attacked never became a part of the charter contract, the Court using the following language: "The fact that the provision in question was embodied in the statute incorporating the Louisiana company does not suffice to show that it became a part of the charter contract, for obviously nothing became a part of that contract that was not within the contracting power of the legislature. Such of the provisions of the statute as were within that power became both a law and a contract and were within the protection of the contract clause of the Constitution, but such of them as were not within that power became a law only, and were as much subject to amendment or repeal as if they had been embodied in a separate enactment. As was said by this court in Stone v. Mississippi, supra: 'It is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain'." The same ques-

tion was before the Court in Stone v. Mississippi, 101 U. S. 814, the state here had attempted to give a right to certain individuals to conduct a business that has been outlawed in nearly every civilized country. There is hardly any right necessary for the safety, morals and welfare of a community greater than the right to protect its women, children, and men from the evil effects of a lottery. Certainly the State of Mississippi could not contract away this right. And in the case of Butchers Union Slaughter House vs. Crescent City Live Stock Etc., 111 U. S. 746, the Court expressly held as follows: "The denial of this power, in the present instance, rests upon the ground that the power of the Legislature intended to be suspended is one so indispensable to the public welfare that it cannot be bargained away by contract. It is that well known but undefied power called the 'police power'." We therefore respectfully present to this Honorable Court that when the State of Louisiana contracted with the appellant corporations that it was not surrendering a right given to it by its police power. This was decided in the Ferrandou case. But aside from this decision, how could the welfare, peace, and safety of the majority of the citizens of the State of Louisiana be affected by the right given to the appellant corporations to catch, can, import and export shrimp and oysters. Numbers of other people were at the identical time engaged in the same business. By engaging in this business they were employing numerous citizens of the State of Louisiana and adding to the wealth of the state by employing these citizens as well as by paying a severance tax to the state, and in the case of the Sea Food Company adding to the wealth of the state from any profits coming to the

stockholders of the corporations who were residents of the state. There was nothing vicious or immoral in the business of which then or now could possibly injure the welfare of any citizen of Louisiana.

In attempting to abridge or nullify this contract by forbidding these appellant corporations from carrying out the grants given in their charters, the state is not benefiting its citizenship or protecting those living within its borders, for obviously the law permits, the shrimp and oysters to be shipped from the state in unlimited quantities.

As the law permits any citizen or association of citizens to engage in this business.

As the law permits non-residents or aliens working in catching these oysters for the resident corporations, owning packing plants or shucking sheds.

The state can not say that the object of the law is to conserve to the people any food supply.

It can not say that the object of the law is to conserve to its resident citizens the right to catch the oysters and shrimp in the waters of the state, and as all of the fertilizer and chicken feed obtained is shipped out of the state, it can not say that the object of the law is to use these articles to increase the general prosperity, and therefore the peace and happiness of those engaged in agriculture within the state. In fact all that the state can say in defense of this attempt to deny rights granted these appellant corporaitons under their charters, is that because originally while in a

wild state, the subject matter of the commerce in oysters and shrimp belong to the State of Louisiana, the state has a right to place any condition upon the subsequent commerce in these articles, even though this commerce reaches beyond the limits of the State of Louisiana, and in any other case would be under the protection of the commerce clause in the constitution of the United States. This we say to Your Honors in our opinion is beyond the powers of the State of Louisiana, this right does not eminate or spring from its police powers, it is not in keeping with the often repeated rules laid down by this Honorable Court in construing the meaning of police powers.

It is only an arbitrary unreasonable regulation seeking to give to certain persons in Louisiana a monoply in the carrying on of commerce, the right to engage in and carry on, which was granted the appellant corporations under their charters.

The roads of a state not only belong to it but are subject to its regulation; they constitute not only a thing of value to a state but are vitally necessary to the peace, prosperity, welfare and morals of its citizens. Yet in the instant case, had the charter given a right to the Sea Food Company to operate a truck carrying freight along these roads in Louisiana, and this traffic was no more injurious to the roads than the general traffic upon the roads, and was of the same type carried on generally by other citizens. Could the State of Louisiana, by a law guised under its police powers, destroy the privilege granted under a charter lawfully obtained? We say not, and respectfully present

to this Honorable Court that the cases above cited by us including the Dartmouth College case support our position, right here want to pause and say to Your Honors that the appellees contend that the State of Louisiana may burden and interfere with commerce because of the original ownership of wild life by the State of Louisiana, that this original ownership takes the product thereof from without the general rule laid down by the Courts of our land respecting interference with commerce. Does not the state also own the title to its public highways? Does it not also have the right given it by this Court time and time again to regulate the use of these highways? Yet has not this Court also said in many decisions that this regulation may not go to the extent of burdening or restricting commerce between the states?

Therefore, we present to Your Honors that the right attempted to be destroyed by the State of Louisiana which was given to these appellant corporations in their charters is not taken away because these corporations are exercising any business or function contrary to the police powers of the State of Louisiana, but that state is attempting to destroy this right in order to effectually prevent the defendant corporations from successfully engaging in interstate commerce.

It has not forbade them to engage in this commerce, but by the sections of the acts complained of it has attempted to regulate and restrict this commerce by compelling these corporations to erect certain buildings in Louisiana; by compelling these corporations to use less skilled la-

bor located in Louisiana; by compelling these corporations to remove their factories to Louisiana, thereby largely destroying their value; by compelling the corporations to less the value of their present locations at Biloxi, Mississippi, and to engage in business under new conditions in a new locality, with such uncertainity as to the results of the business as to cause the corporations to apprehend that it will destroy their business. In conclusion on this point we respectfully call to this Honorable Courts attention the fact that in Miller vs. New York, 82, U. S. 15 Wall. 478, cited by appellees, the State of New York had reserved the right to alter, modify or repeal an act of incorporation, therefore, this Honorable Court held that no contract was impaired.

Reply to Brief of Attorney General of the State of Louisiana.

The foregoing brief has been addressed to the argument advanced in the brief of Mr. John Dymond, who appeared herein for the Conservation Commissioner of Louisiana. We shall, therefore, not go over the same argument again in opposition to the brief of the Attorney General of Louisiana, which brief, except for a question of estoppel argued, contains the same argument advanced by Mr. Dymond, relying upon the same cases, which cases we have here attempted to show have no application to the question before this Honorable Court, except that the Attorney General has quoted a number of cases that we consider are so entirely different from the question here presented that we shall call to the court's attention only the fact that these

cases involved a valid exercise of the police power vested in states.

The case of Holden v. Hardy, 169 U. S. 366, decided the right of Utah to regulate the hours that miners worked in the mines of the state, unquestionably this was a valid exercise of its police power.

The case of Dent v. West Virginia, 129 U. S. 114, decided the right of West Virginia to regulate the practice of medicine in West Virginia, unquestionably a valid exercise of its police power.

The case of Mugler v. Kansas, 123 U. S. 623, decided the right of Kansas to regulate the liquor traffic in its state, unquestionably within its police power.

And the case of Munn v. Illinois, 94 U. S. 113 and Budd v. New York, 143 U. S. 517, were cases where the states were allowed to charge inspection fees and regulate warehouse charges in the two states of Illinois and New York.

In the case of Smith v. Ames, 169 U. S. 466, this court expressly refused to authorize a state to lay a burden upon interstate commerce in order to decrease the rate on intrastate commerce.

Therefore, we respectfully present to the court that the cases above cited have no bearing on the case at bar, except the last mentioned case which supports the general doctrine that under no guise can a state attempt to burden or restrict interstate commerce. We also call to the court's

attention that the further cases cited by the Attorney General of Higdon v. Smith, 191 U. S. 325, and French v. Barber Asphalt Company, 181 U. S. 329, are cases with reference to payment of special assessments for improvements done on property. Carroll v. Greenwich Insurance Company, 199 U. S. 401, is a case authorizing the state to restrict agreements between insurance companies, and Hertado v. California, 110 U. S. 535, is a murder case deciding that due process of law was given to the appellant. Therefore, without further going into the new cases cited in the brief of the Attorney General we say to the court that nothing new is brought out in this brief, the same being simply a renewal of the arguments advanced in the brief of Mr. Dymond.

We really cannot understand the theory on which both of these gentlemen argue for it is apparent by their brief that they admit three things:

1. They admit that the sole purpose and intent of this statute is to compel the removal into Louisiana of factories packing shrimp and oysters now situate without the state of Louisiana.

2. That were these factories to remove to Louisiana they could pack and ship, without restriction, not only the oysters packed by them, but also all by-products of the oysters.

3. The brief also admits that the ruling of the Judges in the case of Wallace v. Elmer and Louisiana v. Ferrandou was correct and that in both of these cases there was a

burden laid on interstate commerce that was beyond the power of the state to levy.

After having admitted the above facts, both briefs, and particularly the brief of the Attorney General, goes ahead at great length to explain to Your Honors that while the above is true, the act questioned is a conservation measure purely and simply, citing in support of this position one fact, which is, that the law by its title and by its words declares that it is a conservation measure.

They make no argument that the food will be conserved to the people of the state of Louisiana; that the shells or hulls of the shrimp will be conserved to the people of the state of Louisiana; that the people will thereby benefit by the use of fertilizer, chicken feed, etc., nor is there one time mentioned where this law will compel any of the shells to be re-deposited upon the reefs of Louisian as clutch; in fact, in the brief of the appellees there is admitted practically every fact stated in the affidavits offered in proof by the appellants, except the contention of the appellants that Louisiana was not a suitable place in which to engage in the operation of a canning factory, and we submit to the court here that the fact the twelve citizens of Louisiana were willing to affirm to this fact is almost overwhelming proof of this fact, considering that the citizens lived in the parishes about which this evdence was being given.

In other words, although admitting in their argument that the law is not intended to conserve anything that it allows the shipment in unlimited quantities of the products of this wild life of the state from the state, they ask this

court to uphold it as a measure aimed against the destruction of the wild life of the state so that this wild life may be saved for its people, supporting this proposition only by presenting to Your Honors the fact that the title of the bill says this is true, and that certain words used in the bill says this is true.

Without again reutterating the many authorities we have heretofore presented to the court, we respectfully say that this Honorable Court has time after time gone on record in favor of this proposition, that in a question involving the constitutional rights of citizens, especially the rght given under the commerce clause, that this court will not be bound by the words used in declaring the purposes of a statute, but that it devolves into a question for judicial determination and the court itself will look into all the facts and circumstances surrounding the act.

We shall now take up for a limited space the argument of the Attorney General to the plea of estoppel advanced in the shrimp case. The Attorney General has made mention of the participation by Mr. Chinn in certain proceedings before the legislature in Louisiana when this law was passed. We therefore shall, in a limited way, go into the facts involving this alleged estoppel. Looking at it from its worst aspect, it appears that certain factory men from Biloxi, Mississippi, were present in Baton Rouge vigorously opposing the passage of this bill. Mr. Dymond says that they later entered into a compromise about the bill. It is therefore reasonable to assume that they saw the bill would be passed and attempted to save themselves by doing what—by persuading the other side to give them a years time before the bill

went into effect. Thereupon the legislature amended the bill so as to allow this years time, and during this year, when no suit could have been commenced against the enforcement of this act because it was not in force, the Attorney General alleges that the Foster-Fountain Company fished in Louisiana. He alleges that the Foster-Fountain Company paid the tax and entered into an agreement to obey the law as it was written. Now, in opposition to this, we respectfully call to the court's attention the evidence of Mr. Chinn, found in the shrimp record, which shows that he represented no one but himself before the Louisiana legislature and that he and the other packers who were there had vigorously fought the passage of this act, and only agreed to the compromise under duress. We further respectfully show to the court that thereafter there was certain valid provisions of this act that it was the duty of our clients to obey. It was his duty to obey the provisions with reference to paying the severance tax; it was his duty to obey the provisions regarding the type of shrimp to be caught; it was his duty to obey the provision with reference to obtaining a license for a schooner; it was his duty to obey the provision regulating the time of the year in which shrimp could be caught. These were valid regulations by Louisiana of its natural resources and because of an effort to obey these regulations the appellant, Foster-Fountain Company, was compelled to contract away their constitutional right is not an estoppel, and we respectfully call to the court's attention the following cases.

In the case of Michael N. O'Brien v. John G. Wheelock, 184 U. S. 450, the one complaining against a statute had as-

sisted in getting it passed, and in deciding that this did not take away from the complaining party his right to attack an unconstitutional statute, this Honorable Court in citing the case of South Ottawa v. Perkins, 94 U. S. 267, said:

> "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

We further call to the court's attention the recently decided case of Pugh v. Pugh, 32 L. R. A. (N. S.) 594, and Buck v. Kuykendell, 267 U. S. 307, 69 L. Ed. 623, especially referring the court to pages 626 and 627 of 69 L. Ed. 623, and pausing here we want to call to the court's attention that both the case of Buck v. Kuykendell, as well as the case of Geo. W. Bush and Sons v. Malloy, 267 U. S. 317, absolutely substantiates the position we take with reference to interstate commerce in that these cases decide that, although the state may regulate a highway which it owns, which it has built with its money, holding it as trustee for the people of the state and for their use and benefit, it can-

not exercise its authority over a road so as to restrict or interfere with commerce between the states.

We therefore suggest to the court that looking at it from the standpoint of the facts cited by the appellees in the brief of the Attorney General that there was no action on the part of the Foster-Fountain Company that could be construed by this court as arising to the dignity of a contract between Louisiana and the Foster-Fountain Company, and that unless the court so believed it will find no merit in the plea of estoppel.

All of the cases cited by the appellees in support of the contention of the Attorney General were cases in which the facts arose to the dignity of a contract between the parties and by which contract the party estopped had secured something of value which he still held and clearly he could not thereafter go into a court of equity with clean hands.

In the instant case, however, the record shows that from the beginning of the fight to pass this act, it was opposed by the Foster-Fountain Company. This opposition continued until defeat was apparent, necessarily they yielded to the inevitable and thereafter in carrying on the commerce, which they had a right under the constitution of the United States to carry on, they obeyed the valid features of this act complained of. In obeying the valid parts of this law they were compelled to sign away their constitutional right, that is, the right of attacking a law invalid under the commerce clause. This act was an act performed under duress in the first place, and, in the second place, there are some rights one cannot waive. Furthermore, we

respectfully call to the court's attention that any act on the part of Mr. Chinn in contracting away the constitutional right of the corporation he represented would be beyond his power as president ultra vires.

The case of Ry. Co. v. Osborn, 193 U. S. 17, 48 L. ed. 598, was a case in which a railroad company had procured a charter under a general act of the legislature. This court held that therefore the railroad company was estapped to deny the constitutionality of the act to which it owed its existence.

The case of Booth Fisheries Co. v. Industrial Commission, 271 U. S. 208, 70 L. ed. 908, is not in point. In that case an industrial corporation elected to come under the provisions of the workmens compensation act which, it was not obliged to do. The court held that since it had adopted the act in its entirety it was in no position to question the constitutionality thereof.

Appellants invoke the rule announced in Territory of Arizona v. Copper Mining Co., 233 U. S. 87, 59 L. ed. 863. The observations of the appellee upon the question of estoppel are only applicable to case No. 768. No question of estoppel is raised in case No. 769. Mr. Chinn made affidavit that he applied to the Conservation Department for the right to catch shrimp on behalf of the Foster-Fountain Co., a Louisiana corporation, having the right under its charter so to do. That he was denied this right unless he would sign an application agreeing to comply with every portion of the Conservation law.

As said in the case of Buck v. Kuykendall, 267 U. S. 307, 69 L. ed. 623, the Foster Fountain Packing Co. does not rely upon any provision of the statute assailed. He was perfectly willing to comply with all the conservation acts found in the law. The Conservation Department had no right to require of him, as a condition precedent, to the exercise of this right, and the legislature of the state of Louisiana had no right to attach, as a condition thereto, a provision depriving it of its property without due process of law, and one violating the commerce clause of the constitution of the United States. Buck v. Kuykendall, supra; F. & D. Co. v. Tafoya, supra.

In the last mentioned case this court said:

> "Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right artibrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result. Frick v. Pennsylvania, June 1, 1925 (268 U. S. 473, 69 L. ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603); American Bank & T. Co. v. Federal Reserve Bank, 256 U. S. 350, 358, 65 L. ed. 983, 989, 25 A. L. R. 971, 41 Sup. Ct. Rep. 499; Badders v. United States, 240 U. S. 391, 394, 60 L. ed. 706, 708, 36 Sup. Ct. Rep. 367; United States v. Reading Co. 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90. Thus the right to exclude a

foreign corporation cannot be used to prevent it from resorting to a federal court (Terral v. Burke Constr. Co. 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186, 42 Sup. Ct. Rep. 188); or to tax it upon property that by established principles the state has no power to tax (Western U. Telg. Co. v. aKnsas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190), and other cases in the same volume, and later that have followed it; or to interfere with interstate commerce (Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57; Looney v. Crane Co. 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; Western U. Telg. Co. v. Foster, 247 U. S. 105, 114, 62 L. ed. 1006, 1016, 1 ALR 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438). A state cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the state making the attempt. New York L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 852, 14 Sup. Ct. Rep. 952."

There is another complete reply to the plea of estoppel filed by the appellees in cause No. 768. The plea is one to the jurisdiction of the court and asked that the original complaint be dismissed therefor. The three-judge court took no action thereupon, and no cross-appeal has been taken by the appellees in the case. So we respectfully submit that the plea of estoppel is not really presented and before the court in the case.

There is still another answer to the argument in that the plea of estoppel, if good, would have no application to the allegations of discrimination in the original bill of com-

plaint and the proof offered in support thereof. In other words, even if the appellants in case No. 768 agreed to comply with the laws of the state of Louisiana, they did not agree to be bound by the discriminatory construction placed thereupon complained of in the original bill of complaint and shown by the proof.

Other authorities directly in point will be found original brief page 147.

In view of the fact that the question of estoppel is not raised and not applicable to case 769, and in view of the further fact that the rights of many other persons than the appellants in cause No. 768 are involved, we invoke the rule announced by this court in Wright v. Davidson, 181 U. S. 371, 45 L. ed. 900, wherein the court used the following language:

> "However, as we learn from this record that there are others than the appellees concerned in the question of the validity of the act of congress, and as the decision of the court of appeals, by declaring the act void as to the appellees, operates to defeat or suspend proceedings under it, and under other existing acts of congress in similar terms, respecting public improvements in the District, we prefer to pass by the question whether the appellees are estopped by having made the dedication imposed as a condition precedent to the opening of the streets. and to place our decision upno the question discussed by the court of appeals, and which controlled its decision; namely, that of the constitutionality of the act of Congress under which the proceedings were had."

Counsel cite the case of Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370. The statute there under consideration was passed by the state of Maryland as an inspection law under clause 2 section 1 art. 1 of the constitution of the United States, in the following language:

> "No State shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such law shall be subject to the revision and control of the Congress."

The acts now under review are in no sense inspection acts.

In the case of Foote v. Stanley, 232 U. S. 494, 58 L. ed. 687, this court held invalid an inspection law of the state of Maryland, because the tax levied was in excess of the amount required for inspection purposes.

In the case of Patapsco Guana Co. v. N. C. 171 U. S. 345, 43 L. ed. 191, this court sustained an inspection law on commercial fertilizers in excess of the amount necessary to make the inspection. The court used the following language:

> "Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state into an-

other, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

"No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. Minn v. Barber, 136 U. S. 313, 34:455, 3 Inters. Com. Rep. 185). And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally."

The tax in this case is not made as an inspection tax and has absolutely no relation thereto.

In conclusion we want to call to the court's attention the splendid opinion of Judge Holmes, which is contained in the latter attached to the Attorney General's brief as a part of the appendix thereto. The Attorney General states that Judge Holmes afterwards waived that opinion. We respectfully say that the only act of Judge Holmes evidencing that the opinion was waived was simply his courteous act of joining with the other two Judges in signing the order which had been arrived at by the majority of the statutory court. We consider that this was both his duty as a Judge and a gentleman, but the court can readily see from the forceful manner in which his position was taken that Judge Holmes was of the opinion that the law was unconstitutional.

In conclusion, we desire to say that necessarily the printed argument in this cause being already very voluminous, we are unwilling to further burden the court with a

more complete exposition of all the facts and circumstances in the case; however, before departing, we want to again call Your Honors' attention to the position taken by the appellee whereby they come into this Honorable Court and say this is a valid law, it is valid because it is a conservation measure, it is valid because it aims at preserving a food supply to the people of Louisiana, and acting under the decisions of this and other courts sustained this argument, we ask the court to declare the law constitutional; however, we further say to the court that what we want is to declare it constitutional merely because of its wording, for, in fact, its intent is not to conserve to the people of Louisiana any food supply, it is not to prevent the destruction of the wild life of Louisiana, it is not to give to the citizens of Louisiana the exclusive right to reduce to possession this wild lfe, except to certain preferred citizens, but its real object and purpose is to add to the wealth of Louisiana and to the taxable values of Louisiana by compelling persons in other states to remove their factories to Louisiana and there manufacture a raw product which the state of Louisiana has parted title with upon collecting a severance tax and has allowed to go out into general commerce in limitless quantities and without restriction.

We further respectfully urge upon the court that while a state can confine an article owned by the state in its original state to internal commerce, that this commerce must in fact be internal and not in name only. That this Honorable Court never has, and, in our opinion, never will agree

to any definition of commerce between the states except such definition as will include all intercourse and business transactions which began in one state and ended in another state. That any other position would be fraught with the very greatest danger to the intercourse upon which the nation's most vital welfare is founded.

The State of Louisiana is by this law attempting to drive a wedge that will tend to split the hitherto solid opinion of all the courts of the land that interstate commerce was without the power of a state to interfere with, and, regardless of the fine words and smug expression in which their law is clothed, we believe that Your Honors will see its true intent and in our opinion we cannot better conclude our argument than by quoting the words of Mr. Hale in Thurlow v. Massachusetts, 5 How. 504, when in closing his argument he addressed this Honorable Court as follows:

> "My clients rely with confidence upon that protection to commerce which this Court on divers occasions have extended, though in so doing they have been under the necessity of pronouncing the legislation of more than one State invalid and unconstitutional. It was to protect commerce that this Union was established. Take away that power from the General Government, and the Union cannot long last ..... I leave this case, in the confidence that my clients, in common with all the other citizens of this whole country, will ever find (as they ever have in time past) in this Court, a full and ample protection for their constitutional

rights, against which the waves of fanaticism, as well as of faction, may beat harmlessly."

We respectfully submit that the decrees appealed from should be reversed.

Respectfully submitted,

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